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No. _____

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In The

Supreme Court of the United States

October Term, 1991

TONY AND SUSAN ALAMO FOUNDATION, TONY ALAMO, SUSAN ALAMO, AND LARRY LAROCHE,

Petitioners,

vs.

LYNN MARTIN, SECRETARY OF LABOR,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the threshold burden of proof enunciated in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946) required of the Secretary of Labor on behalf of the employee in an action for back wages is satisfied simply by the claim of the Secretary that back wages are due.

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OPINIONS DELIVERED BELOW

The subject Order and Amended Judgment of the United States District Court for the Western District of Arkansas are printed in their entirety in the Appendix attached hereto at pages App. 1-3. The opinion of the United States Court of Appeals, Eighth Circuit, is reported at 952 F. 2d 1050 (8th Cir. 1992), and said opinion and Judgment of the Court of Appeals are printed in their entirety in the Appendix attached hereto at pages App. 4-10.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The opinion of the United States Court of Appeals for the Eighth Circuit was entered on January 3, 1992 (see Appendix, pages App. 4-10). This petition is being filed within ninety (90) days of that date, in accordance with Rule 13 of the Rules of the Supreme Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1254(1) and 2101.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 1291

29 U.S.C. Section 201

29 U.S.C. Section 203(m)

29 U.S.C. Section 206(a)(1)

29 U.S.C. Section 207(a)(1)

29 U.S.C. Section 217

(Only citations for the above list of statutes are provided at this point; their pertinent text is set forth in the following Appendix.)

STATEMENT OF THE CASE

On December 19, 1977, the Secretary of Labor brought this action under Section 17 of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 217, to enjoin the Tony and Susan Alamo Foundation, Tony Alamo,

Susan Alamo, and Larry LaRoche[1] (collectively, "Foundation") from violating the Act's minimum wage, overtime and recordkeeping requirements and from withholding back wages allegedly owed to over 300 individuals (referred to throughout the proceedings as "associates").

The Tony and Susan Alamo Foundation is a nonprofit religious organization. The Foundation does not solicit contributions from the public, but derives its income largely from the operation of commercial businesses staffed by the Foundation's "associates," most of whom were drug addicts, derelicts, or criminals before their rehabilitation by the Foundation. These workers received no cash salaries, but the Foundation provides them with food, clothing, shelter, and other benefits.

Following evidentiary hearings on April 28-30, 1982, and September 8-9, 1982, the United States District Court for the Western District of Arkansas rendered its decision, holding the Foundation liable for violating the Act and enjoining it from violating the Act in the future. See, *Donovan v. Tony and Susan Alamo Foundation*, 567 F. Supp. 556 (W.D. Ark. 1982). The District Court awarded back wages to outside workers who were not associates of the Foundation, but did not make awards for those associates who testified or for any other nontestifying associates. Instead, the District Court ordered the Secretary to mail a notice of the court's decision to each associate and advise any associate desiring to claim back wages to submit a claim in the form of an affidavit within 45 days of the

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[1] Susan Alamo died in 1982, and Larry LaRoche was subsequently dismissed from this action.

mailing of the notice by the Secretary. The District Court ordered the Secretary to submit a proposed finding of back wages due each associate based on the affidavits, less the applicable Section 3(m) benefits found due.[2] The District Court further concluded that Section 3(m) benefits in the following amounts should offset back wages: $2,700.36 per associate in 1976, $2,088.72 per associate in 1977, $2,703.60 per associate in 1978, $2,887.20 per associate in 1979, $3,239.04 per associate in 1980 and $919.14 per associate in 1981. 567 F. Supp at 566-70.

Both parties appealed to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals affirmed the District Court as to liability, but reversed and remanded as to the back wage award. See, *Donovan v. Tony and Susan Alamo Foundation*, 722 F. 2d 397 (8th Cir. 1983). The Court of Appeals held that the District Court had improperly placed on the employees the burden of initiating proceedings to obtain payment of back wages:

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[2] Sections 6 and 7 of the FLSA, 29 U.S.C. Sections 206 and 207, require that an employer pay employees covered by the Act a minimum hourly wage and overtime compensation at a premium rate for hours worked in excess of 40 per week. These wages must be paid in cash; the sole statutory exception to this obligation is provided in Section 3(m) of the Act, 29 U.S.C. 203(m), which allows an employer to count as wages paid the "reasonable cost" to an employer of providing an employee with board, lodging, or other facilities, if such items are "customarily furnished" by the employer to his employees. 29 C.F.R. 531.28; *Brennan v. Heard*, 491 F. 2d 1, 3 (5th Cir. 1974); *Brennan v. Veterans Cleaning Service, Inc.*, 482 F. 2d 1362, 1369 (5th Cir. 1978); *Shultz v. Hinojosa*, 432 F. 2d 259, 266 (5th Cir. 1970).

> The solution to the problem presented "where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes" is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying the compensation as contemplated by the Fair Labor Standards Act.

722 F. 2d at 404. The case was remanded to the District Court for "determination of the amounts of wages owing, such determination to be based either upon the present record or as supplemented by such additional evidence as the District Court may afford the parties an opportunity to offer [citation omitted]." 722 F. 2d at 405.

On the Foundation's petition challenging the application of the Act to a religious institution and the constitutionality thereof, this Court granted certiorari, ultimately affirming, on April 23, 1985, the Court of Appeals' decision. See, *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985).

In response to the remand of the Court of Appeals, on September 11, 1984, the District Court entered its *Memorandum and Order* wherein it made the following finding:

> [T]he Secretary argued that in 1976 there were 316 "associates" of the Foundation, and this court should award an amount which will

> compensate all 316 for sixty hours work per week. *During the course of the hearings, this court repeatedly told the Secretary's attorneys that there was no evidentiary basis for concluding all associates were full time employees of the commercial businesses.*
>
> . . .
>
> This court did not accept that argument. Under the evidence, the term "associate" simply cannot be used interchangeably with the term "employee" under the Act. (emphasis added)

On November 26, 1986, the District Court entered a judgment enjoining the Foundation from violating the minimum wage, overtime and recordkeeping provisions of the Act and ordering payment of back wages and prejudgment interest to ten testifying associates.[3] The 1986 judgment specifically identified Section 3(m) deductions in the amounts found by the District Court in its 1982 decision. As to the nontestifying associates, the District Court denied the Secretary's request for a back wage award and dismissed such claims without prejudice. A back wage award was granted only for various testifying associates. The District Court concluded that, as to the nontestifying associates, in spite of their denials that they were entitled to any compensation for their work, the evidence supported the inference that they (the testifying associates) were entitled to compensation for 40 hours per week from January 1, 1976, until the injunction was

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[3] The 1986 judgment incorporated a Memorandum and Order entered by the District Court on September 11, 1984, while the Foundation's petition for certiorari was pending before this Court.

entered in the case. The District Court dismissed without prejudice the Secretary's claims on behalf of the approximately 300 associates who did not testify. Both parties again appealed to the Court of Appeals.

On March 28, 1988, the Court of Appeals affirmed the District Court's award of back wages and again remanded the case for the District Court to "estimate and fashion a reasonable remedy that restores as fully as possible for all the employees covered by the FLSA who were improperly denied compensation, regardless of the lack of records." *Brock v. Tony and Susan Alamo Foundation*, 842 F. 2d 1018 (8th Cir. 1988). On May 30, 1989, the District Court on remand entered a partial judgment, awarding back wages and prejudgment interest to two testifying former associates and one outside worker and enjoining the Foundation from violating the relevant portions of the FLSA with respect to its employees. Once again as to the nontestifying associates, District Court (finding no support in the record) refused to enter a back wage award. This partial judgment was appealed by the Foundation and affirmed by the Court of Appeals on September 25, 1990. See, *Dole v. Tony and Susan Alamo Foundation*, 915 F. 2d 349 (8th Cir. 1990). The Court of Appeals again remanded the case for entry of a back wage award for the nontestifying associates.

While the appeal of the District Court's Pretrial Judgment to the Court of Appeals was pending, further proceedings were being held at the District Court level for the purpose of establishing the amounts owed the various nontestifying associates. By letter of June 1, 1988, the Secretary submitted that the District Court need not reopen the record to hear additional evidence on the

issue of the amount of unpaid wages due to each associate of the Foundation who did not testify. (Previously, the Foundation had moved the District Court to present additional evidence, however, the motion was denied.) Instead, the Secretary submitted that the court could make findings of the amount of unpaid wages due to each non-testifying associate in the same way as it did with respect to testifying associates Ann Elmore, Larry LaRoche and Edward Mick. In this regard, the Secretary noted that, based on a forty-hour work week, the court had earlier found that these testifying associates were due $1,875.64 for 1976, $2,695.28 for 1977, $2,808.40 for 1978, $3,144.80 for 1979, $3,208.96 for 1980 and $822.86 for 1981.

In an effort to determine the amount, if any, of the back wages due the nontestifying associates, the Secretary submitted a series of interrogatories requesting the identity of each of the associates who worked in the commercial enterprises of the Foundation and the amount and type of work performed by each associate. The number of associates had previously been established as follows: 316 associates in 1976, 385 associates in 1977, 355 associates in 1978, 347 associates in 1979, 337 associates in 1980 and 314 associates in 1981. The number of total associates is derived from the district court's first decision. 567 F. Supp. 565, 567, 568, and 569. These numbers were based on schedules provided to the Secretary by the Foundation.

By letter of July 7, 1988, the court allowed the Secretary to propound the interrogatories suggested. The Foundation responded to the Secretary's interrogatories with a list of associates and hours worked for the years in

question, 1976-1981. The Foundation's answers to these interrogatories identified the following number of associates engaged in commercial activities: 189 associates in 1976, 229 associates in 1977, 229 associates in 1978, 252 associates in 1979, 272 associates in 1980 and 205 associates in 1981. The information supplied in these answers noted that for 1976 the associates worked 19-24 hours per week; for 1977, 5-23 hours per week; for 1978, 15-18 hours per week; for 1979, 15-20 hours per week; for 1980, 0-27 hours per week; and for 1981, 8-20 hours per week.

On July 30, 1990, the Secretary filed with the District Court a Motion for Entry of Judgment, submitting that a judgment should be entered (based upon a forty-hour work week) restraining the withholding of back wages to each of the remaining known or unknown nontestifying associates in the amount of $1,875.64 for 1976, $2,695.28 for 1977, $2,808.40 for 1978, $3,144.80 for 1979, $3,208.96 for 1980 and $822.86 for 1981. In response to the Secretary's Motion for Entry of Judgment, the Foundation stated that it had supplied the names of all individuals defined as employees under the FLSA, and that it was not required under the Act to identify associates who were not involved in the commercial activities of the Foundation, i.e., those associates who attended services but did not work for the Foundation. Furthermore, the Foundation asserted that calculations for back wages should be based upon the information provided in its answers to interrogatories.

In its Order of August 22, 1990, the District Court agreed with the Foundation that the judgment need only reflect an award for each associate identified and

acknowledged as having worked in the commercial businesses of the Foundation and granted the Secretary's Motion for Entry of Judgment only in part. The District Court directed the Secretary to prepare and submit to the court a proposed judgment reflecting an award for each associate *identified* by the Foundation.

By letter dated September 13, 1990, the Secretary submitted a proposed judgment to the District Court; and by letter dated September 28, 1990, the Foundation objected that the Secretary had not used the hours that the Foundation claimed its associates had worked and that the Secretary had not given the associates credit for benefits, as determined by the district court in its 1982 decision, 567 F. Supp. at 566-570. By Order entered on October 9, 1990, the court directed that the proposed judgment be revised in light of the Foundation's comments.

On October 7, 1990, the Secretary filed a motion for reconsideration, pointing out that the Foundation already had been given the credits for benefits as determined in the District Court's 1982 decision and that it was too late for the Foundation to suggest an alternative to the computational approach advanced by the Secretary. On November 5, 1990, the District Court denied the Secretary's motion for reconsideration.

On December 5, 1990, the Secretary advised the District Court that the remaining associates were not due any unpaid wages if the Foundation were given "double credits" for board, lodging and other facilities. Despite the Secretary's strong objections to this course, the District Court, on January 9, 1991, entered an Order, stating

that the Secretary had advised the court that no additional amounts were due and dismissing the entire action "with prejudice."[4]

The Secretary appealed to the United States Court of Appeals for the District Court's January 9, 1991, Order.

The Court of Appeals, in a decision dated January 3, 1992 (952 F. 2d 1050 (8th Cir. 1992)), reversed the District Court's Order and remanded the action to the District Court "to enter an order awarding the nontestifying employees back pay in conformity with the Secretary's proposed judgment." 952 F. 2d at 1052.

ARGUMENT AND REASON FOR ALLOWANCE OF WRIT

The Court of Appeals for the Eighth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. Furthermore, the Court of Appeals has departed from the holding of this Court announced in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946).

On December 19, 1977, the Secretary of Labor initiated this action against the Petitioners, The Tony and Susan Alamo Foundation, Tony Alamo, and others, for alleged violations of Sections 6, 7, 11, and 15 of the Fair Labor Standards Act (29 U.S.C. Sections 206, 207, 211, and 215).

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[4] On April 2, 1991, the district court modified that dismissal by ordering that the dismissal apply only to the claims of the nontestifying associates of the Foundation and not to the earlier injunctions entered in the case.

Throughout this proceeding the Secretary has taken the position that each adult associate of the Foundation is an "employee" as defined by the Fair Labor Standards Act engaged in fulltime employment for 52 weeks per year. The Secretary has consistently contended that all of the nontestifying associates are entitled to a back wage award based upon this theory. The Secretary's position finds its "basis" only in the testimony of the Secretary's compliance officer at the evidentiary hearing held on April 28-30, 1982. The Secretary's position or calculation, which would initially result in a back wage award of over fifteen million dollars, was presented to the District Court by the testimony of the compliance officer. These calculations of a back wage award were simply conclusory yearly figures based on assumption only. The presentation of the Secretary's position to the District Court went as follows:

> Secretary's Counsel: Using the minimum wage of $2.30 an hour and *assuming* the Foundation had three hundred uncompensated inside workers who were employed for sixty hours a week for fifty-two weeks, can you tell us how much minimum wages and compensation are due?
>
> [Objection of defense counsel omitted.]
>
> Secretary's Counsel: Can you tell us how much pay at the minimum wage and overtime is due for 1977?
>
> Labor Compliance Officer: $2,511,600.00 (Trial Transcript ("Tr.") Vol. III, p. 63). (emphasis added)

This line of questioning, based upon the assumption that each associate worked a 60-hour work week for 52 weeks per year, continued for the years 1978, 1979, 1980, and a portion of 1981 (Tr. Vol. III, pp. 63-65). The Secretary's *assumption* that every associate of the Foundation worked in commercial enterprises for 60 hours a week, 52 weeks a year, finds no support in the evidence, as has been noted by the District Court in its Orders and Judgment entered in this case.

On numerous occasions, and despite the Court of Appeals repeated remands, the District Court has consistently rejected the Secretary's calculations. As stated by the District Court in its original decision of 1982:

> The Secretary has taken the position that an appropriate inference to be drawn from the evidence, in absence of accurate records, is that all 300 associates worked 10 hours per day, 6 days per week.
>
> . . .
>
> *It is difficult to draw inferences with any degree of certainty, from the testimony presented, as to the number of associates working in commercial businesses or hours they worked.*
>
> First, *there is no basis for concluding, as the Secretary suggests, that all 300 of the associates worked in the Foundation's commercial businesses.* To the contrary, the evidence reflects that the associates have constructed, decorated and furnished a number of residences, an apartment building, a church, and various other structures used by the Foundation and its associates for non-commercial purposes. The labor for much

> of this construction and the continuing maintenance of the structures was furnished by the associates. As previously mentioned, some associates work at the Foundation in non-commercial jobs, such as babysitting at the nursery, cooking for the other associates, etc. Furthermore, the Foundation produces a television show which obviously requires some non-commercial work time; some associates "witness" on the streets, in hospitals, jails and other places; and some help organize new churches. Additionally, some associates are employees of businesses other than the Foundation's and simply turn their paychecks over to the Foundation. *In any event, while it is difficult to reach any reasonably accurate conclusion as to how many associates work in the commercial businesses at any particular time, it is not reasonable to conclude that all of the adult associates are working in the commercial businesses, or, that the ones who do work in the commercial businesses do so on the regular basis suggested by the Secretary. Donovan v. Tony and Susan Alamo Foundation*, 567 F. Supp. 556, 562-563 (W.D. Ark. 1982). (emphasis added)

No other evidence was presented by the Secretary on the issue of back wages due the nontestifying associates after the District Court's aforesaid ruling.

Again, in 1984, when this case was before the District Court on remand from the Court of Appeals for the Eighth Circuit, the District Court refused to enter a back wage award for the nontestifying employees. The District Court, in its *Memorandum and Order* dated September 10, 1984, made the following declaration:

> *This Court does not believe . . . that there is credible evidence upon which to base an inference as*

> *to the identity of those associates [who performed work], the time period which they worked, or the compensation they are due. Absent some reasonable basis in the evidence for such findings, this court is not willing to award the $15,000,000 or so in benefits sought by the Secretary.* (emphasis added)

Again, in 1989 and 1991, the District Court dismissed the Secretary's claim for a multimillion dollar back wage award for the nontestifying associates. Notwithstanding the obvious lack of evidence, the Court of Appeals has once again remanded this case to the District Court. But this time, and without further evidence being presented, the remand specifically directs the District Court "to enter an order awarding the nontestifying employees back pay in conformity with the Secretary's proposed judgment." *Martin v. Tony and Susan Alamo Foundation*, 952 F. 2d 1050, 1052 (8th Cir. 1992).

The law is clear with respect to the burden of proof required of the Secretary of Labor in an action brought for back wages under the Fair Labor Standards Act. As announced in *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946), the employee or the Secretary on the employee's behalf need only prove a "just and reasonable inference" as to the uncompensated work performed, and once the plaintiff-employee has produced evidence of uncompensated labor, "[t]he burden shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." 328 U.S. at 687-688.

As noted above, the District Court has repeatedly held that there was no evidence presented by the Secretary from which any inferences could be drawn which would justify a back wage award to the nontestifying associates. It has been found by the District Court that the initial burden of proof required of the Secretary in *Mt. Clemens Pottery* has not been met. Yet, the Court of Appeals is directing the District Court to enter an order awarding the nontestifying employees back pay "in conformity with the Secretary's proposed judgment."

The Court of Appeals seems to find support in its position by concluding that the Foundation has not maintained accurate records. But, it was this exact "situation" which resulted in this Court's holding in *Anderson v. Mt. Clemens Pottery Co., supra*. The threshold burden of proof is required of the Secretary even "where the employer's records are inaccurate or inadequate." 328 U.S. at 687.

The difficulty which the District Court has experienced in trying to draw an inference as to the number of associates working or the number of hours they worked first became evident in its "Remedy" provisions set forth in its aforesaid *Memorandum and Order* dated December 10, 1982. See, *Donovan v. Tony and Susan Alamo Foundation*, 567 F. Supp. 556, 576 (W.D. Ark. 1982). The District Court ordered:

> [That] "all persons who have been associates of the foundation or who have worked at any of the businesses" . . . [would be mailed a notice which would] "advise any associate who desires to submit a claim for back wages to submit a claim in the form of an affidavit within 45 days of the mailing of the notice by the

> Secretary. . . . Within 20 days after the deadline for submitting claims, the Secretary shall submit a proposed finding of back wages due each claimant based upon the affidavits, less applicable benefits. . . . The defendants shall have 20 days thereafter in which to respond to the claims submitted." 567 F. Supp. at 576.

While it is true that the District Court's "Remedy" was reversed by the Court of Appeals (*Donovan v. Tony and Susan Alamo Foundation*, 722 F. 2d 397 (8th Cir. 1983)), this part of the District Court's *Memorandum and Order* demonstrates the lack of proof presented by the Secretary on the questions of the number of associates who worked in commercial business and the number of hours worked. The "Remedy" was the "best [the Court] could [do] in assessing damages." *Mitchell v. Riley*, 296 F. 2d 614, 616 (5th Cir. 1961). Since the entry of the District Court's said 1982 *Memorandum and Order*, no testimony or evidence has been presented relative to the nontestifying employees.

As stated in *Anderson v. Mt. Clemens Pottery, supra*, it is incumbent on the employee or Secretary to prove "that he [the employee] has in fact performed work for which he was improperly compensated" and to produce "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." (328 U.S. at 688.)

To even suggest that the Secretary presented "sufficient evidence to show the amount and extent of the nontestifying associates' uncompensated work as a matter of just and reasonable inference" is to contradict the various holdings of the District Court. Yet, the Court of

Appeals insists upon the entry of a back wage award for these alleged employees, regardless of the lack of proof.

It is noted in the Court of Appeals' latest decision that the Secretary has presented a case of "pattern or practice" violations of the Act. This not only runs contrary to the District Court's interpretation of the evidence, but it completely ignores the testimony of the three representative associates.

Pursuant to the District Court's pretrial order of March 20, 1982,[5] (Tr. Vol. I, pp. 9-11), the Foundation called three associates to testify concerning their relationship with the Foundation, with the understanding and agreement that their testimony would be representative of all the associates of the Foundation. The Secretary of Labor was given the opportunity to call any associate who would testify differently from the three representative associates. The three who testified in such representative capacity were Bill Levy, Ann Elmore, and Edward Mick.

The first representative associate to testify was Bill Levy (Trial Transcript ("Tr") Vol. II, pp. 70-117). During the Secretary's examination of Mr. Levy, it was shown that he worked on the Foundation's hog farm whenever

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[5] THE COURT: Why don't you pick out two or three of them and we will assume that if the ones whose statements were furnished testified on that issue they would testify the same way. How will that be Mr. Fitz? MR. FITZ: I don't suppose there would be any problem with that, Your Honor. THE COURT: Mr. Fitz, if you find some among that group you think would testify to the contrary, of course, you are free to call them (Tr. Vol. I, p. 9).

he wanted to help out (Tr. Vol. II, p. 107). There were no set hours for his work at the hog farm as he worked only when he wanted (Tr. Vol. II, pp. 109, 110). It was also shown during the Secretary's examination of Mr. Levy that he worked on jobs unconnected with the Foundation; such as work for a local factory (i.e., Flanders Factory in Fort Smith, Arkansas (Tr. Vol. II, p. 111), and such as work for mason or tree planting subcontractors (Tr. Vol. II, pp. 112-117).)

The second representative associate to testify was Ann Elmore (Tr. Vol. II, pp. 118-154). During direct examination, Mrs. Elmore described her activities during the first few years she was associated with the Foundation, as follows:

> [T]he first four and a half or five years at the Foundation, I did nothing but read the Bible and pray. I'd go out in the streets and witness and testify. That was all I did the first five years (Tr. Vol. II, pp. 127, 128).

Mrs. Elmore also stated during direct examination: "I volunteer my time waitressing in our restaurant. And I loved working up there, because I was a witness for the Lord (Tr. Vol. II, pp. 140, 141)." During the Secretary's cross-examination of Mrs. Elmore, no question was asked about the nature of her work in the Foundation or the number of hours she spent working in what the Secretary labels the Foundation's "commercial" enterprises.

The third representative associate to testify was Ed Mick (Tr. Vol. II, pp. 155-217). During direct examination, Mr. Mick basically stated that he witnessed and testified,

and that he helped out in other activities of the Foundation when he was needed (Tr. Vol. II, p. 65). During the Secretary's cross-examination, Mr. Mick was only asked about his outside jobs, that is, those jobs which were unconnected with the Foundation (Vol. II, pp. 194-195).

The Secretary completely failed to question any of the three representative associates about the type of work in which they were engaged for the Foundation or the number of hours spent in such work. In view of the evidence presented by the representative associates, it is difficult to see any "pattern or practice." The Secretary simply requested the District Court to enter a judgment, *based on assumptions only*, in an amount of over fifteen million dollars ($15,000,000.00).

Appropriately, and despite previous remands from the Court of Appeals, the District Court has continued to refuse to enter a back wage award for the nontestifying employees. Now, however, the District Court is being forced to enter such a judgment as the Court of Appeals is directing the entry of a back wage award "in conformity with the Secretary's proposed judgment."

Not only has the Court of Appeals accepted the Secretary's assumptions and unsupported calculations, but it has rejected the information supplied by the Petitioners to the Secretary in answer to a series of Interrogatories submitted in 1988. The Court of Appeals simply labeled the information and documents produced in response to those interrogatories as "self-serving unsubstantiated approximations." 952 F. 2d at 1052. The information, however, (which took the Foundation months to accumulate and which was based upon all available records and

information relating to the commercial activities of the Foundation) provided (1) the names of the associates who worked in commercial activities, (2) the number of hours each associate worked in such commercial activities for each year in question, and (3) the type of work done by each associate.

The District Court accepted the information provided in these answers to interrogatories as the only credible evidence it had before it on the issue of whether a back wage should be entered; and accordingly, it rejected the Secretary's claim for a back wage award. Unexplicitly, the Court of Appeals has simply discredited this information and has accepted the Secretary's assumption. Yet, the information supplied by the Foundation provided the "most accurate basis possible" at determining the amount of a back wage award, if any. (See, *Dole v. Tony and Susan Alamo Foundation*, 915 F. 2d 349, 351 (8th Cir. 1990).

Given the directive of the Court of Appeals to the District Court and considering the refusal of the Court of Appeals to impose the burden of proof upon the Secretary as announced in *Anderson v. Mt. Clemens, supra,* (other than simply the claim of the Secretary that back wages are due) the Petitioners' only hope for appropriate relief is in this Court's granting their request for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

CONCLUSION

WHEREFORE, petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the decision of the United States Court of Appeals for the Eighth Circuit in Lynn Martin, Secretary of Labor, United States Department of Labor v. Tony and Susan Alamo Foundation, Tony Alamo, Susan Alamo, and Larry LaRoche. In the event that this Petition is granted, petitioners pray that the decision of the Court of Appeals for the Eighth Circuit dated January 3, 1992, be reversed.

Respectfully submitted,

GEAN, GEAN & GEAN
Federal Savings Bank Building
Suite 500, 524 Garrison Avenue
Fort Smith, Arkansas 72901

By Roy Gean III

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ELIZABETH DOLE, Secretary
of Labor, U.S. Department
of Labor — Plaintiff

vs.

TONY AND SUSAN ALAMO FOUNDATION
et al. — Defendants

Civil NO. 77-2183 (Filed Jan. 9, 1991)

ORDER

NOW on this eighth day of January, 1991, comes on for consideration the above-styled cause.

The plaintiff having advised the court that no additional amounts are due, by letter dated December 5, 1990, and filed by the court on December 28, 1990, it is ORDERED that the case be, and it is hereby, dismissed with prejudice.

/s/ Morris S. Arnold
Hon. Morris S. Arnold
United States District Judge

This document entered on
docket in compliance with Rule
58 and 79(a), FRCP
on 1-9-91 by illegible

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

LYNN MARTIN, Secretary
of Labor, United States
Department of Labor — Plaintiff

vs.

TONY AND SUSAN ALAMO FOUNDATION
et al. — Defendants

Civil No. 77-2183 — (Filed Apr. 2, 1991)

ORDER AND AMENDED JUDGMENT

NOW on this first day of April, 1991, comes on for consideration the plaintiff's Motion to Correct Error, filed on March 15, 1991, in the above-styled cause. And no responses were filed.

IT APPEARING to the court that the dismissal ordered entered on January 9, 1991, suggests that the earlier injunctions may have been dismissed, which is not the case, it is ORDERED that the dismissal of the remaining claims in the case applies only as to the nontestifying associates of the defendant Tony and Susan Alamo Foundation. The injunctions earlier entered remain in force. It is FURTHER ORDERED that this Order and Amended Judgment be entered *nunc pro tunc* as of January 9, 1991.

/s/ Morris S. Arnold
Hon. Morris S. Arnold
United States District Judge

App. 3

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on 4-2-91 by MSJ

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

77-2183
No. 91-1465WAFS

Lynn Martin, Secretary of Labor, United States Department of Labor, Appellant, v. Appellees.	* * * * * * * * *	Appeal from the United States District Court for the Western District of Arkansas (Filed Jan. 29, 1992)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

January 3, 1992

A true copy.

ATTEST: /s/ Michael E. Gans
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-1465WA

Lynn Martin, Secretary of Labor, United States Department of Labor, Appellant, v. Tony and Susan Alamo Foundation; Tony Alamo; Susan Alamo; Larry Larouche, Appellees.	* * * * * * * * * * * * *	Appeal from the United States District Court for the Western District of Arkansas

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Submitted: September 13, 1991

Filed: January 3, 1992

Before McMILLIAN, FAGG, and WOLLMAN, Circuit Judges.

FAGG, Circuit Judge.

The Secretary of Labor brought this action under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1988), against the Tony and Susan Alamo Foundation, Tony Alamo, Susan Alamo, and Larry LaRouche (collectively the Foundation) to collect backpay owed to the Foundation's employees. In *Brock v. Tony & Susan Alamo Foundation*, 842 F.2d 1018, 1020-21 (8th Cir. 1988), we

remanded this case to the district court to "award benefits to those employees who were improperly denied compensation." On remand the district court rejected the Secretary's proposed judgment, concluded no remaining backpay was owed to the employees, and dismissed the Secretary's claims. We reverse and remand to the district court for further proceedings consistent with this opinion.

The controlling facts in this appeal are quite simple. The Secretary brought this action to collect backpay owed to Foundation employees under the FLSA's minimum wage and overtime compensation provisions. *See* 29 U.S.C. §§ 206-207. The district court enjoined the Foundation from violating the FLSA and awarded backpay to certain employees who testified about the number of hours they worked. The district court acknowledged " '[t]here were . . . other [employees] of the Foundation who performed work for which they were not properly compensated under the [FLSA],' " but declined to award backpay because the Foundation did not keep records of the hours its employees worked and there was no " 'credible evidence [on] which to . . . identi[fy] . . . [the nontestifying employees], the time period which they worked, or the compensation they are due.' " *Brock v. Tony and Susan Alamo Foundation*, 842 F.2d at 1019. We reversed and remanded, holding "that the district court must estimate and fashion a reasonable remedy that restores as fully as possible all the employees covered by the FSLA who were improperly denied compensation, regardless of the lack of records." *Id.* at 1019.

On remand the district court ordered the Secretary to submit a proposed judgment "reflecting an award for

each [employee] identified by the [Foundation] and acknowledged as having worked in the [Foundation's] commercial businesses" based on the backpay awarded earlier to the testifying employees. The Foundation objected to the Secretary's proposed judgment, contending the judgment overstated the amount of backpay the nontestifying employees were entitled to receive. The Foundation argued the nontestifying employees' backpay award should be based on lists the Foundation submitted identifying the nontestifying employees and approximating the number of hours the employees worked. Further, the Foundation contended the judgment did not account for nonsalary benefits the Foundation provided its employees, which could be offset against any backpay the Foundation owed. *See* 29 U.S.C. § 203(m).

Although the district court had earlier found "[t]he Foundation maintain[ed] no records of the hours worked by [its employees] . . . [and] [t]he records which were 'reconstructed' for this litigation do not accurately reflect the hours worked . . . and are of no benefit to the [c]ourt," *Donovan v. Tony & Susan Alamo Foundation*, 567 F. Supp. 556, 562 (W.D. Ark. 1982) (subsequent history omitted), the district court ordered the Secretary to revise the proposed judgment using the foundation's unsubstantiated approximations of the nontestifying employees' hours and subtracting the section 203(m) benefits the Foundation had provided its employees. Because using the Foundation's approximations resulted in no backpay award, the district court dismissed the Secretary's claims.

On appeal the Secretary contends the district court failed to carry out this court's mandate by ordering the

Secretary to base its proposed judgment on the Foundation's unsubstantiated approximations of the nontestifying employees' hours, rather than the Secretary's "pattern or practice" evidence based on the hours the testifying employees worked. We agree. Throughout this litigation the Foundation maintained it had no records of the hours its employees worked. Yet, after this court remanded the case to the district court to fashion a remedy for the nontestifying employees "regardless of the lack of records," 842 F.2d at 1019, the Foundation came forward and "set forth in detail (based upon all available records and information . . .) The names of [employees] . . . , the number of hours the [employees] worked . . . , and the type of work done by each [employee]," Foundation Brief at 3. Recognizing the Foundation's creative record keeping for what it is – a last-ditch attempt to subvert this court's earlier opinion – we reject the Foundation's belated offering.

We issued our opinion on a fully developed record, including the district court's findings that the Foundation maintained no employee work records and the Foundation's "reconstructed" records were inaccurate. Our opinion thus foreclosed the Foundation from attacking the Secretary's "pattern or practice" evidence on remand with self-serving, unsubstantiated approximations of the hours its employees worked. *See Houghton v. McDonnell Douglas Corp.*, 627 F.2d 858, 864-65 (8th Cir. 1980). Based on the record before the court, we held the nontestifying employees were entitled to recover backpay, and "[t]he district court simply could not make a contrary determination." *Id.* at 865. Indeed, the district court was bound to follow this court's opinion directing the district court

to fashion a remedy for the nontestifying employees. *Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456 (8th Cir. 1990).

In remanding this case to the district court we cited *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946), in which the Supreme Court made clear that when an employer has failed to keep proper records, courts should not hesitate to award damages based on the "just and reasonable inference" from the evidence presented, *id.* at 687. We contemplated the district court awarding backpay to the nontestifying employees based on the fairly representative testimony of the testifying employees. *See, e.g., McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988), *cert. denied*, 488 U.S. 1040 (1989); *Donovan v. Bel-Loc Diner, Inc.*, 70 F.2d 1113, 1116 (4th Cir. 1985); *Donovan v. Burger King Corp.*, 672 F.2d 221, 224-25 (1st Cir. 1982). The Foundation "cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had [the Foundation] kept records in accordance with the [FLSA]." *Mt. Clemens Pottery*, 328 U.S. at 688. Thus, the district court committed error in rejecting the Secretary's proposed judgment for the nontestifying employees that was based on the backpay awards made to the testifying employees.

The Secretary also contends the proposed judgment properly credits the Foundation for the section 203(m) benefits the Foundation provided its employees. Having reviewed the record, we agree. The district court made express findings concerning the value of the section 203(m) benefits the Foundation provided its employees. 567 F. Supp. at 563-70. In its proposed order the Secretary relied on the district court's findings and reduced the

employees backpay awards by the value of those benefits. The district court simply overlooked that the Secretary accounted for the section 203(m) benefits in its proposed order.

Accordingly, we reverse the district court's order dismissing the Secretary's claims against the Foundation seeking backpay for the nontestifying employees. We remand this case to the district court to enter an order awarding the nontestifying employees backpay in conformity with the Secretary's proposed judgment.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

28 U.S.C. Section 1291:

Final Decisions of District Courts. The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in section 1292(c) and (d) and 1925 of this title.

29 U.S.C. Section 201:

This chapter may be cited as the "Fair Labor Standards Act of 1983."

29 U.S.C. Section 203(m):

"Wage" paid to any employee includes the reasonable costs, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees: Provided, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the particular employee: Provided further, That the Secretary is authorized to determine the fair value of such board, lodging, or other

facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to an employee.

29 U.S.C. Section 206(a)(1):

Every employee shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates: (1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section.

29 U.S.C. Section 207(a)(1):

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions. (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives

compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. Section 217:

The district courts, . . . shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).